correct, if it can be done without injustice to the other party. In the present case the damage has already been done and it seems futile in the circumstances to punish the plaintiffs by striking out the 2 later actions only to have them then plead the matters in those actions in the first action.

Accordingly I hereby make an order in terms of the first numbered paragraph of the summons namely that the 3 numbered actions be consolidated and do proceed as 1 action. As to title of the consolidated action I make an order in terms of paragraph (ii) of the summons and add that the principal action shall be this action. As to the matter raised in paragraph (iii) of the application namely that 1 action be tried immediately after another I reserve the matter and accordingly adjourn the application to that extent. As to costs sought in paragraph (iv) of the summons, as the application was not opposed I make no order as to the costs of the application and further order that plaintiffs and the defendants do pay their own costs heretofore and hereafter thrown away by reason of 3 actions being commenced instead of 1 action.

S. RAMASAMY S/O CHOCKALINGAM CHETTIAR

v.

KM. S. KUMARAPAN CHETTIAR @ KN. S. KUMARAPPA CHETTIAR S/O K. M. S. CHOCKALINGAM CHETTIAR

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 469 OF 1977]
20 JULY 1994

PRACTICE & PROCCEDURE: Order 34 r. 8(2) RHC 1980 - Court issuing notice to plaintiff to show cause why his action should not be dismissed for want of prosecution - Policy behind the granting of power to Court - Principles applicable - Dispute regarding administration of estate - Delay of 16 years and 7 months in setting case down for trial - Whether delay intentional and contumelious - Whether explanation for delay satisfactory.

The plaintiff and defendant were brothers and the beneficiaries of their late father's estate. The defendant was the administrator of the estate. On 14 September 1977 the plaintiff filed a writ of summons against the defendant alleging improper management and fraud. Subsequently, the parties made several interlocutory applications but on 17 February 1980 the plaintiff filed his statement of claim and on 1 March 1980 the defendant filed his defence. The plaintiff applied for the defence to be struck out as showing no reasonable defence to the plaintiff's statement of claim and after several postponements it was fixed to be heard on 14 May 1981. The Court subsequently informed the parties that the application would not be heard on 14 May but would be heard on a date to be fixed. Thereafter no date was given by the Court and no inquiries were made to the Court resulting in the case becoming dormant. 7 years later, the defendant filed a notice of intention to proceed and on 8 May 1988, the defendant applied for an order that the action be dismissed for want of prosecution. The application came up for hearing on 3 October 1988 but after several adjournments, was struck out in the absence of both parties. At the same time the Court ordered that a notice to show cause be issued by the Court to the plaintiff pursuant to O. 34 r. 8(2) of the Rules of the High Court 1980 (RHC). The plaintiff filed the summons for directions a day before the

hearing of the notice to show cause and was granted the usual orders. On 6 January 1990 the plaintiff filed the pleadings and the bundle of documents but failed to set the action down for trial. The case became dormant again resulting in the Court issuing the present notice to show cause.

The plaintiff filed an affidavit to explain the delay submitting that he had discovered a Deed of Gift and Release sometime in January 1989 and realised that the defendant had no furhter beneficial interest in the estate afterwhich he instructed his solicitors to file a writ known as High Court Alor Star Suit No.23-11-1989. The plaintiff prayed that either the present suit be stayed until the final disposal of Suit No.23-11-1989 or alternatively be consolidated with suit No.23-11-1989 and be heard together.

Held:

[1] The policy behind O. 34 r. 8(2) of the RHC was explained by Salleh Abas FJ (as he then was) in *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 at page 153 as follows:

> Before November 12, 1976 dismissal of a plaintiff's action for want of prosecution could only be ordered by the Court upon an application by the defendant to that effect. The Court had then no power to pull up a slumbering plaintiff who had done nothing to bring the case to a speedy trial. Since that date, however, the Rules of the Supreme Court 1957 were amended to enable the Court or the Judge to issue a notice to show cause to the parties requiring the plaintiff to explain why his action should not be dismissed for want of prosecution (O. 36 r. 11A(2) of the Supreme Court Rules 1957 and now O. 34 r. 8(2) of the RHC 1980). The present position therefore is that a plaintiff's action could be dismissed for want of prosecution either on the application of the defendant or on a notice to show cause to him issued by the Court, but the principle which guides the Court in determining the question whether the action should be dismissed for want of prosecution remains the same...

As to the principle to be followed by the Court in applying the rule, his Lordship ruled:

> ...that the plaintiff's action is liable to be dismissed for want of prosecution when the Court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it...

[2] In applying the principle to the facts of the present case it was clear that there had been a very long delay. Taking the time from the date of the filing of the writ until the date of the latest notice to show cause, there had been a delay of 16 years and 7 months. In the Court's view, this delay was an intentional and contumelious action disrespectful to the Court.

[3] Having considered the plaintiff's affidavit and the submission of learned Counsel for the plaintiff, the Court was not convinced that the plaintiff had given a satisfactory explanation for such a long delay. On the supposition that Suit No.23-11-1989 had some relevance and was inter-related to the present suit, it was noted that the suit was filed in 1989 but until today had not been disposed of and no explanation whatsoever was given for the delay in the hearing of that case. Furthermore, if at all a stay of proceedings or consolidation was considered necessary in view of Suit No.23-11-1989, then, why was it that until now the plaintiff had not made the necessary applications? Accordingly, the Court dismissed the plaintiff's action.

[Plaintiff's action dismissed].

Cases referred to:

Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 25 r. 1, O. 34 r. 8(2)
Supreme Court Rules 1957, O. 36 r. 11A(2)

Other sources referred to:
English Supreme Court Practice

For the plaintiff - R. Rajasingam; M/s. Rajasingam & Co.
For the defendant - T. Subbiah; M/s. Subbiah & Co.

JUDGMENT

Mohd Hishamudin Bin Mohd Yunus JC:

By a notice dated 27 April 1994 (encl. 49) issued by this Court to the parties pursuant to O. 34 r. 8(2) of the Rules of the High Court, the plaintiff was asked to show cause to explain why his action should not be dismissed for want of prosecution.

I shall set out the background facts. The plaintiff and the defendant are brothers and are the beneficiaries of the estate of their late father, K.M.S. Chockalingam Chettiar. This suit concerns a dispute between them regarding the

administration of the estate of their late father. The defendant is the administrator of the estate and is sued as such. The plaintiff alleges improper management of the estate and fraud on the part of the defendant. The plaintiff claims, *inter alia*, for:

(1) An order that the defendant, as the administrator of the estate, do disclose on oath or affirmation all the moveable and immoveable assets of the estate of the intestate.
(2) An order for the full and final administration of the estate of the intestate, with all the necessary and proper accounts, directions and enquiries.
(3) An order for the realization of all the moveable and immoveable properties of the estate of the intestate and, if necessary, for the apportionment of the estate, as may be agreed between the parties.
(4) An order for the distribution in equal shares between the plaintiff and the defendant, as beneficiaries of the estate, of the nett proceeds of sale of all the assets of the estate of the said intestate.

The plaintiff filed the writ of summons (encl. 1) on 14 September 1977. The statement of claim was not filed together with the writ. On the same date, the plaintiff also filed:

(a) an *ex parte* interlocutory application by way of summons in chambers (encl. 3) applying for an interlocutory injunction; and
(b) a certificate of urgency (encl. 2).

On the same day itself, the application was heard and granted by the Senior Assistant Registrar. It was also ordered that the order (encl. 4) was valid only until 1 October 1977, with liberty given to the plaintiff to reapply by *inter partes* notice of motion for a further order. On 21 September 1977, the plaintiff filed an *inter partes* notice of motion (encl. 5) applying for a further interlocutory injunction.

On 24 September 1977, the defendant filed his memorandum of appearance (encl. 7).

The notice of motion (encl. 5) was heard before the judge on 1 October and was dismissed. But the learned Judge ordered the defendant to provide an undertaking not to dispose off the assets without the order of the Court. The undertaking was filed by the defendant on 11 October 1977 (encl. 10).

On 17 November 1979, the defendant filed a summons in chambers (encl. 13) applying for the action to be dismissed for want of prosecution. However, when this application came up for hearing on 2 February 1980, the defendant withdrew the application.

On 31 January 1980, the plaintiff filed in a notice of change of solicitors (encl. 16): from Messrs Chandran & Company to R. Rajasingam & Co.

On 17 February 1980, the plaintiff filed his statement of claim (encl.17).

On 1 March 1980, the defendant filed his statement of defence (encl. 18).

On 25 March 1980, the plaintiff, by summons-in-chambers (encl. 19), applied for the statement of defence to be struck out as showing no reasonable answer or defence to the plaintiff's statement of claim. The application was fixed for hearing on 3 May 1980. After several postponements, finally, on 10 January 1981, by consent of both parties, it was adjourned to a date to be fixed. Subsequently, the Court notified both parties that the application would be heard on 14 May 1981. But on 3 May 1981, the Court notified both parties that the application would not be heard on 14 May, as scheduled, but would be heard on a date to be fixed. However, thereafter, no date of hearing was given by the Court. The parties also never wrote to the Court to inquire. The case became dormant for several years thereafter.

However, seven years later, one of the parties woke up from the slumber. For on 5 March 1988, the defendant filed in a notice of intention to proceed (encl. 35). On 8 May 1988, the defendant by summons-in-chambers (encl. 37), again applied to the Court for an order that the action be dismissed for want of prosecution. The matter was fixed for hearing on 30 June 1988. But before the date of the hearing, the plaintiff, on 17 July 1988, again filed in a notice of change of solicitors (encl. 38): from Messrs Rajasingam & Company to Messrs Praba and Associates. On 30 June 1988, the hearing was adjourned to a date to be fixed. Subsequently, it was fixed to be heard on 3 October 1988. However, when the matter came up for hearing on 3 October 1988, both parties were absent and the Court, accordingly, ordered that the application be struck out. At the same time the Court also ordered that a notice to show cause be issued by the Court to

the plaintiff; and so, on 5 October 1988, the Senior Assistant Registrar issued a notice to show cause (encl. 43) pursuant to O. 34 r. 8(2) of the Rules of the High Court to the parties. After the issuance of that notice, on 1 November 1988, that is to say, a day before the hearing of the notice to show cause (which was fixed for 2 November), the plaintiff filed the summons for directions (encl. 44) pursuant to O. 25 r. 1 of the Rules of the High Court. When the matter came up for hearing on 14 November 1988, the plaintiff was allowed by the Court to proceed.

The summons for directions was heard before the Senior Assistant Registrar on 15 March 1989 and, by consent, the usual orders (encl. 45), including the order for the setting down for trial within 30 days, was granted by the Court. But it was only almost a year later, that is, on 6 January 1990, that the plaintiff filed the pleadings (encl. 48), the agreed bundle of documents (encl. 47) and the disagreed bundle of documents (encl. 46). It is also sad to note that the plaintiff failed to set the action for trial. The case became dormant again. Hence the present notice to show cause.

Now, on the law, the policy behind O. 34 r. 8(2) was explained by Salleh Abas F.J. (as he then was) in *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 at page 153 as follows:

> Before 12 November 1976 dismissal of a plaintiff's action for want of prosecution could only be ordered by the Court upon an application by the defendant to that effect. The Court had then no power to pull up a slumbering plaintiff who had done nothing to bring the case to a speedy trial. Since that date, however, the Rules of the Supreme Court 1957 were amended to enable the Court or the Judge to issue a notice to show cause to the parties requiring the plaintiff to explain why his action should not be dismissed for want of prosecution (O. 36 r. 11A(2) of the Supreme Court Rules 1957 and now O. 34 r. 8(2) of the Rules of the High Court 1980). The present position therefore is that a plaintiff's action could be dismissed for want of prosecution either on the application of the defendant or on a notice to show cause to him issued by the Court, but the principle which guides the Court in determining the question whether the action should be dismissed for want of prosecution remains the same. Surely this case reflects the dilatory nature of judicial proceedings held under procedural rules adopted in an adversary system in which the Court is expected to stand aloof like the Greek God, Zeus, who sitting on the height of Mount Olympus, and only peering down from that summit upon the doings and misdoings of his subjects below will not act unless moved by them. If accumulation of cases is regarded as valid criticisms and an anathema against the administration of justice in this country, and we have heard these criticisms repeated time and time again not only by Judges and lawyers but also by laymen such as politicians and businessmen and other citizens, surely one of the key solutions to this problem is to give power to the Court to intervene in appropriate cases, when situations call for intervention without having to wait to be moved by the parties. The Court should be more active than it has been hitherto. Although the rules laid down elaborate time tables for the parties to follow but if the plaintiff does not adhere to it and the defendant is shy or on account of respect for the plaintiff or for any other reason is reluctant to take up the step provided by the rules, the suit is simply pushed into further slumber, and perhaps into deep coma from which it could never regain consciousness and yet for stastical purposes it adds to the backlog of cases giving the Court a bad name as being an indolent lot. Public interest therefore demands that the Court should have the power to wake such sleeping cases and deal with them appropriately according to justice. This is the very reason why in 1976 a small departure was made in our procedural rules from the **English Supreme Court Practice** whereby the High Court in this country is given power to issue notice to show cause to the plaintiff to explain why his action should not be dismissed for want of prosecution when he has taken no step to give notice of trial, notwithstanding the fact that the defendant makes no such application and in appropriate cases the Court has power to dismiss the case because of the plaintiff's failure to give satisfactory response to such notice. This amendment however, does in no way affect the principle upon which the Court will determine the question whether or not to dismiss the plaintiff's action for want of prosecution. Such principle, we reiterate here, remains unchanged despite the amendments to the rules.

As to the principle to be followed by the Court in applying the rule, his Lordship ruled:

> Counsel for both sides cited to us many authorities including *Vasudevan v. Damodaran & Anor.*, a recent decision of a different panel of this Court. We accept the statement of the law stated by Abdoolcader J. who wrote the judgment of this Court as being correct. We add that not unmindful of the difficulties experienced by the Court of Appeal in England in *Biss v. Lambeth* and the Chancery Division in *Joyce*

v. Joyce in applying the House of Lord's decision in *Birkett v. James*, we propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus - that the plaintiff's action is liable to be dismissed for want of prosecution when the Court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it. We now proceed to apply this principle to the present case under appeal.

I shall now proceed to apply the above principle to the facts of the present case. On the facts, it is clear that there has been a very long delay. Taking the time from the date of the order pursuant to the summons for directions (15 March 1989) until the date of the latest notice to show cause issued by the Court (27 April 1994) there has been a lapse of five years. But taking the time from the date of the filing of the writ (14 September 1977) until the date of the latest notice to show cause, there has been a delay of sixteen years and seven months! In my view, this delay is an intentional and contumelious action disrespectful to the Court.

The plaintiff has filed an affidavit (encl. 50) explaining the delay on 24 May 1994. (On the same day, yet another notice of change of solicitors was filed (encl. 51): this time, from Messrs Praba & Associates back to Messrs Rajasingam & Company). Encik Rajasingam, learned Counsel for the plaintiff, submitted that the relevant paragraphs in the affidavit are paragraphs 8, 9, 10, 11, 12 and 13 which state as follows:

8. I now state that (I had discovered) a deed of gift and release dated 16 October 1958 a few days after my mother's death sometime in January 1989.

9. It was only then I realised that the defendant in this suit had no further beneficial interest in my late father's estate.

10. I immediately caused my present solicitors to file a writ in this Honourable Court known as High Court Alor Star Suit No. 23-11-1989 on 21 May 1989.

11. A copy of the said writ is now produced and shown to me and exhibited hereto marked as "R-1".

12. It is my humble application that Suit No. 23-11-1989 would follow the decision in Suit No. 23-11-1989.

13. I therefore pray that either Suit No. 469/1977 be stayed until the final disposal of Suit No. 23-11-1989 or in the alternative be consolidated with Suit No. 23-11-1989 and heard together in the interests of justice.

In my opinion, after having considered the above affidavit and, the submission of learned Counsel for the plaintiff, l am not convinced that the plaintiff has given a satisfactory explanation for such a long delay. The reference to Suit No. 23-11-1989 does not seem to me to provide any answer. On the contrary, such reference raises some questions. Even on the supposition that that action (Suit No. 23-11-1989) has some relevance and is inter-related to the present suit, it will be noted that that suit was filed in 1989 but until today that case has not been disposed of and no explanation whatsoever is given for the delay in the hearing of that case. Furthermore, if at all a stay of proceeding in respect of the present case is considered necessary in view of Suit No. 23-11-1989, then, why is it that until now the plaintiff has not made any application for the stay of proceeding of the present case until the disposal of that case? Or, alternatively, if at all that a consolidation of the two cases is considered necessary, why is it that an application for consolidation of the two cases was never made by the plaintiff even until today?

Accordingly, this action is dismissed.